# The Indiana Prosecutor

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## RECENT DECISIONS

### TELL SUSPECT LAWYER THERE TO SEE HIM

*Malinski v. State*
____N.E.2d____
(Sup. Ct. 9/3/03)

David Malinski was arrested by officers of the Griffith Police Department six days after Lori Kirkley disappeared from her Valparaiso home. A short time later, Porter County investigators arrived to question Malinski regarding his involvement in Lori's disappearance. Malinski signed a Miranda waiver form and gave Porter County officers a recorded statement.

Early the following morning, Malinski agreed to give a second statement. This time questioning was done by FBI agents involved in the investigation. Again, Malinski was advised of his *Miranda* rights and waived those rights. That same morning Malinski's wife and brother sought legal help for Malinski. At about 9:45 a.m. on July 28, attorney John Martin went to the Porter County Jail where Malinski was being held and asked to speak to Malinski. Martin was repeatedly denied access to Malinski and Malinski was never informed that Martin was trying to reach him.

Malinski filed a Motion to Suppress his statements claiming that his right to counsel guaranteed by Article I Section 13 of the Indiana Constitution had been violated. The trial court denied Malinski's motion.

The Supreme Court reiterated that Section 13 of the Indiana Constitution affords Indiana's citizens greater protections than does its federal counterpart. The Court agreed with Malinski that an incarcerated suspect has a right under Section 13 to be informed that an attorney hired by his family to represent him is present at the station and seeking access to him. The Court seemed to distinguish those circumstances in which an attorney personally appears at the location of the suspect's interrogation from those in which an attorney simply calls the station.

A suspect can, of course, waive his right to counsel and give a statement while in custody.

At issue in the *Malinski* case was the voluntariness

of the suspect's waiver and confession when an attorney was close at hand and wishing to confer with him. Looking at the totality of the circumstances, the Supreme Court in *Malinski* concluded that withholding information about counsel's presence did not render Malinski's waiver invalid. The Supreme Court decided, therefore, that the trial court did not err in denying the defendant's motion to suppress.

This is an opinion of which prosecutors will want to make all law enforcement agencies within their jurisdictions aware. IPAC Executive Director Stephen J. Johnson faxed a memo regarding this case to each Indiana prosecutor's office on the day the opinion was received in the Council Office.

## OVWI JURY INSTRUCTION DISFAVORED

*Stoltmann v. State*
____N.E.2d_____
(Ind. Ct. App. 8/15/03)

On December 10, 2002, a Vanderburgh County jury found Andrew Stoltmann guilty of Operating a Motor Vehicle While Driving Privileges Forfeited for Life and Operating a Vehicle While Intoxicated, as a Class C Misdemeanor.

On appeal, Stoltmann challenged the trial court's giving of a final jury instruction that instructed the jury that, "A defendant's refusal to submit to a chemical test may be considered as evidence of the defendant's guilt." Two panels of the Indiana Court of Appeals had previously concluded that the giving of this instruction did not constitute an abuse of discretion. But, in this August 15, 2003, opinion the Court held that "while Stoltmann's refusal to take the chemical test was admissible into evidence, the challenged instruction unduly emphasizes its importance." The Court found that this particular instruction confuses and misleads the jury by permitting the jury to infer that the refusal is sufficient to establish all of the elements of the offense of OVWI.

The Court of Appeals offered in support of its conclusion that the refusal instruction was error, the Indiana Supreme Court's disapproval of what the Court of Appeals termed an analogous instruction. In 2001, the Supreme Court, in *Dill v. State,* held that the trial court had erred in instructing the jury that "it could consider the flight of a person after the commission of a crime" as evidence of guilt.

Errors in giving or refusing instructions are harmless where, notwithstanding the giving of the instruction, a conviction is clearly sustained by the evidence. Stoltmann admitted to the deputy who stopped him that he had operated a vehicle and was intoxicated. The trial court's error in giving the refusal instruction in the *Stoltmann* case was, therefore, harmless.

## PETITION TO TRANSFER FILED IN

*D & M HEALTHCARE, et.al*
*v.*
*O'BANNON et.al.*

On September 12, 2003, the Attorney General's Office filed a petition to transfer in the *D & M Healthcare v. O'Bannon* case handed down by the Court of Appeals on August 13, 2003. In *D & M Healthcare* five nursing homes sought declaratory judgment that House Bill 1866 became law notwithstanding the governor's veto. House Bill 1866 limited the authority of the Indiana Family and Social Services Administration (FSSA) to reduce Medicaid reimbursement rates to nursing homes. At issue was whether the requirements of the Indiana Constitution that a vetoed bill be returned to the legislature on the first day of the next session is satisfied by return of the bill when the legislature is not in session. House Bill 1866 was returned six months before the first day of the next legislative session.

The trial court determined that the governor's veto was effective and that HB 1866 had not become law. The Court of Appeals reversed the trial court

holding that HB 1866 became law, notwithstanding the governor's veto.

This case is of special interest to Indiana prosecutors and judges in that another bill that passed both houses of the legislature in 2001 but was vetoed by the governor was the bill that would have raised the pay of judges and prosecutors from $90,000 to $99,000 per year. That bill too was returned to the legislature when the legislature was not in session.

## FROM OTHER JURISDICTIONS

The Washington State Supreme Court wrote on September 11, 2003, that law enforcement officers cannot attach a Global Positioning System tracker to a suspect's vehicle without a warrant. This may well be the first such ruling in the country.

Spokane County deputies had a warrant that permitted them to attach a GPS tracking device to William Bradley Jackson's vehicle, although prosecutors argued that they did not need one. The State equated GPS tracking to tailing Jackson in an unmarked car. The high court agreed that the warrant in Jackson's case was valid, but rejected the state's comparison of GPS to tailing a suspect. Washington State Supreme Court Justice Barbara Madsen wrote in the unanimous decision of the Court that "Use of GPS tracking devices is a particularly intrusive method of surveillance, making it possible to acquire an enormous amount of personal information about the citizen under circumstances where the individual is unaware that every single vehicle trip taken and the duration of every single stop may be recorded by the government."

The Washington Supreme Court did not overturn Jackson's murder conviction, however. With GPS tracking, law enforcement officials were able to track Jackson when he returned to the grave of his 9-year-old-daughter. The defendant sought to have the warrant that permitted attachment of the tracking device to his vehicle thrown out, arguing that the warrant was based on the premise that if he was guilty, he might return to the scene of the crime. Jackson argued that this did not provide a sufficient basis for a warrant. The Supreme Court did not agree and affirmed Jackson's murder conviction.